The Commerce Power--from Gibbons v. Ogden to the Wagner Act Cases*

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The channels of interstate commerce became deeper last month when the stream of labor litigation emerged with the stamp of constitutionality.[1] Even before this important announcement, proponents of the President's court reorganization plan ventured early rejoicing when the Court "fell into line" with the Railway Labor Act decision.[2] To characterize the decision as one gained under pressure and as personal victory does great injustice to the Court; for such prejudice overlooks the fact that the basis of decision in the steel,[3] trailer,[4] Associated

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[1] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 57 Sup. Ct. Rep. (1937); *National Labor Relations Board* v. *Fruehauf Trailer Company*, *id.*, 642; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, *id.*, 645; *Washington, etc. Coach Co.* v. *National Labor Relations Board*, *id.*, 648; *Associated Press* v. *National Labor Relations Board*, *id.*, 650.

These cases were decided under the Wagner Labor Relations Act [Act of July 5, 1935, 49 Stat. at L. 449, c. 372, 29 U.S.C. Sec. 151], Section 1 of which provides as follows: "The denial by employers of the right to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing the diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce."

[2] *Virginian Ry. Co.* v. *System Federation No. 40*, 57 Sup. Ct. Rep. 592 (1937), upholding collective bargaining for railway employees as provided by the Railway Labor Act.

[3] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, note 1, *supra.*

[4] *National Labor Relations Board* v. *Fruehauf Trailer Co.*, note 1, *supra.*

Press,[5] and clothing[6] cases is not entirely new but has been supported and fostered by other similar phases of development under the commerce clause.[7] For a number of years business whose life is movement, which draws raw products in to be processed and sent out through the channels of interstate commerce and which depends for its life upon that commerce has been properly subjected to federal protection.

This is the "current of commerce" doctrine,[8] drawn upon to sustain the government in the case of *Stafford* v. *Wallace*.[9] There under the Packers and Stockyards Act of 1921, federal supervision was imposed upon the business of commission men and livestock dealers. In answer to the claim that a purely intrastate matter was being regulated, it was pointed out that "the object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards . . . and thence in the form of meat products to the consuming cities of the country. . . "[10]

The Stockyards cases and others to be mentioned later[11] provide language which is indicative of federal expansion in interstate commerce leading to the recent Labor cases. Business dependent upon movement is not a new subject of regulation,

[5] *Associated Press* v. *National Labor Relations Board*, note 1, *supra*.

[6] *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, note 1, *supra*.

[7] The clause reads: "Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Const., Art. I, Sec. 8, Cl. 3. Congressional control of foreign and Indian commerce has generally been regarded as absolutely subordinate to the sovereignty of the federal government. It is with respect to interstate commerce that federal power has been constantly challenged and defined. The Wagner Labor Act decisions have again provoked controversy and speculation, furnishing incentive to survey the trend of federal expansion under the interstate aspect of the commerce clause.

[8] This theory was first announced by Mr. Justice Holmes in *Swift & Co.* v. *United States*, 196 U.S. 375 (1905), discussed in Ribble, *The Current of Commerce: A Note on the Commerce Clause and the National Industrial Recovery Act*, 18 Minn. L. Rev. 296, 312 (1934).

[9] 258 U.S. 495 (1922).

[10] *Id.*, 514.

[11] See pp. 318, 319, *infra*.

though power in this field has in the past been exercised cautiously and with no certain predictability of standard.[12] The recent decisions have deepened the channels of commerce to include labor relations in business concerns which are dependent to some degree upon movement for consummation of their transactions, but it now seems that this movement need not meet such a particularized doctrine as the "current of commerce." It is apparent that a great number of manufacturing establishments heretofore considered essentially local[13] and subject therefore to state control will, because of their newly recognized affiliation with movement, yield at least their labor problems to national surveillance. However, in view of the *Guffey*[14] and *Schechter*[15] decisions, one is not yet prepared to say that regulation of hours, wages, and other conditions of labor have become subject to federal control merely because collective bargaining, one aspect of a business, has been declared to "affect" interstate commerce.

When the suggestion is made that aspects of trade may be commerce for one purpose and not for another, one suspects that a teleological classification can be made of federal expan-

[12] Congressional regulation of business as related to movement is well developed in Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335 (1934).

[13] The following statement in *Kidd* v. *Pearson*, 128 U.S. 1, 20 (1888), though rising as a case involving state power, is typical of the long-accepted doctrine that manufacturing is essentially of local concern: "Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. . . . If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago?"

[14] *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936).

[15] *A. L. A. Schechter Poultry Co.* v. *United States*, 295 U.S. 495 (1935).

sion under the commerce power.[16] The ends which have been deemed valid by the Court and to meet which legislation has been framed, sincerely or ostensibly in an attempt to secure national growth, include (1) protection and promotion of interstate commerce itself[17] (2) denial of commerce to articles and persons whose delivery through commerce would effect an immoral, unhealthful, or deceitful influence upon the people[18] (3) encouragement of proper intrastate control by bending commerce to the purposes of the states.[19] This classification furnishes a workable pattern by which to chart the national trend. But before going too specifically into the matter, it would be well to see why a teleological explanation is necessary at all.

Recent writers[20] have held the commerce power to be ple-

[16] A careful analysis of the growing federal police power has been made by Profesor Cushman in *National Police Power under the Commerce Clause of the Constitution*, 3 Minn. L. Rev. 289, 381, 452 (1919). The development of national power is pursued in this article through the *Child Labor Cases*.

[17] Cushman, note 16, *supra*, 289.

[18] *Id.*, 381.

[19] *Id.*, 452.

[20] Corwin in *The Commerce Power versus States Rights* (1936) attempts to rebut six propositions supported by the Court:

(1) That the framers of the Constitution conferred upon Congress the power to regulate commerce among the States with a different intent than the power to regulate foreign commerce, with the result that the former power is of less scope than the latter power.

(2) That the power to regulate commerce among the States does not comprise the power to prohibit it.

(3) That while Congress has power to restrain commerce among the States for the benefit of such commerce this power is not available for the promotion of the general welfare in other respects.

(4) That the reserved powers of the States constitute a limitation upon Congress's power to regulate commerce among the States and serve to withdraw certain matters from the jurisdiction of the latter power.

(5) That production is a subject which is segregated to the reserved power of the States, and so lies outside the range of Congress's power to regulate commerce among the States.

(6) That Congress's purpose in enacting a measure is a judicially enforcible test of the validity of such measure ift it invades the ordinary domain of the States.

The author attempts to show that these propositions are historically unwarranted and therefore represent a lack of understanding or wilful error on the part of the Court. It is submitted that the author has given too much attention to comparing the language of the various decisions without consid-

nary, have deplored the Court's conservatism in narrowing implied powers which early might have led to a strong federal control of all business. The argument is made that at the time the Constitution was adopted the word "commerce" meant not merely movement but a variety of transactions affecting business beyond state lines.[21] The wide connotation of the word, it is contended, would have produced a field of federal supremacy sufficiently broad to include and wipe out all distinctions made with respect to the functions of commerce and its effects. Consideration of the historical enactment of the commerce clause and the diplomatic functions of the Supreme Court may point out the reason for such supposed restrictions.

The concern of the Constitutional Convention was primarily to eliminate the jealousies of the states which had worked mutual hardships through tariffs, port duties, and restrictive licenses. The Articles of Confederation had failed to provide this needed harmony, with the result that in September, 1786, five states met at Annapolis to "take into consideration the trade of the United States; to examine the relative situation and trade of said states; to consider how far the uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several states such an act relative to this great object. . . "[22]

It was at once apparent that an effective regulation of commerce would demand a complete reorganization of the govern-

eration of the facts giving rise to them and consequently has frequently confused dicta and holding. For example, the author cites *Gibbons* v. *Ogden* for the proposition that the power given by the commerce clause is plenary and exclusive in all instances. *Id.*, 24 *et seq.* The facts of the case concern merely regulation of an interstate waterway—a field in which national interest predominates to the exclusion of any state action whatsoever. As to such an exclusive field of commerce, federal power is possessed of all the characteristics named by Marshall. That these same characteristics would exist if the commerce power were applied to other subjects is merely dictum and is unfairly used to accuse the court of retraction of supposed early liberalism.

[21] Hamilton, Walton H., and Adair, Douglas, *The Power to Govern* (1937) is the most recent work dealing with this problem.

[22] Virginia, leader of the movement, gave this instruction to her commissioners. 1 Elliot, *Debates on the Federal Constitution,* 115 (2d ed. 1836).

ment, and members of the Annapolis group took steps to bring about the Federal Convention at Philadelphia in May, 1787.[23] Finding its immediate incentive in a proposed regulation of commerce, the Convention soon set about to remedy the defects of the Articles of Confederation.[24] The objective of the meeting soon formed about the early resolution of Randolph:

> That the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.[25]

The delegated powers were assumed to be necessary for embracing matters which extended beyond state lines—which states, therefore, could not regulate with effectiveness.[26] Since the grant in regard to commerce is the only broad power over business and trade mentioned, it is believed by some that the framers intended all business of national import to be subject to federal regulation. In support of this argument, the defini-

[23] *Id.*, 119.

[24] The Articles gave no centralized control over commerce, with the result that the individual state's bargaining power abroad was slight and gained advantage only at the pleasure of foreign nations. Great Britain, for example, excluded American vessels from participation in her West Indies trade. At home, the states with valuable ports and waterways imposed upon neighboring states less favorably situated. "Some of the States," as Madison has described, "having no convenient ports for foreign commerce were subject to be taxed by their neighbors, through whose ports their commerce was carried on. New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms." Farrand, *The Framing of the Constitution* (1913) 7.

[25] Madison's Debates, H.R. Doc. No. 398, 69th Cong., 1st Sess. (1927) 117.

[26] The theory that the delegated powers should extend to matters not capable of local control is supported even by those who opposed ratification of the Constitution as it was framed. James Monroe in argument against ratification is reported to have said: "What are the powers which the federal government ought to have? I will draw the line between the powers necessary to be given to the federal, and those which ought to be left to the state governments. To the former I would give control over the national affairs; to the latter I would leave the care of local interests." 3 Elliot, *op. cit.*, note 22, *supra*, 214.

tions of commerce current at the time of the Convention have been set forth as denoting 'trade, traffic, buying and selling or the exchange of goods,' with movement of goods as only one of its connotations."[27] Although our present understanding of commerce is an "exchange of commodities" across state lines, we must understand the word as it was used in the Constitution.

Perhaps it was intended, and we may concede the intention, that an intrastate business not capable of being effectively regulated by the state should be subjected to federal control, at least for effects wholly national in character. The economy of 1787 did not define what businesses were national in import; in fact it cannot reasonably be contended that the problem of interstate business regulation was that primarily intended by the commerce clause, for the closely integrated system of the present century had not yet emerged. Modern business organization, therefor, is not a problem capable of historical interpretation.

The chief concern of the Fathers was to free the channels of commerce. Conditions of transportation presented the first and most obvious field affecting more states than one and was that in which the jealousies of the states had been nurtured. It is not strange, therefore, that movement in commerce has been evolved as the controlling concept,[28] which identifies commerce essentially as movement and has developed the idea of protection to movement, denial of movement to injurious articles, and adaptation of movement to state needs. The original meaning of commerce not only as movement but as business affecting more states than one may be conceded and yet justification made for the hesitation of the Court in withholding liberal definitions of what constitutes business on a national scale, or business in interstate commerce. Our new capitalistic society

[27] Stern, note 12, *supra*, 1346. The early dictionaries are cited as authority for this statement: The American Encyclopedia (1798); Webster's Dictionary (1806); Samuel Johnson's Dictionary (6th ed. 1785); Alexander's Columbia Dictionary (1800); Perry's Royal Standard Dictionary (4th Am. ed. 1796). The meaning ascribed to commerce here is supported by the findings of Walton Hamilton, *op. cit.*, note 21, *supra*.

[28] See Stern, note 12, *supra*, 1335 *et seq.*

has effected an economy totally different from that previously known. The definition of business on a national scale was something without precedent, to be approached with care, for the implications of such holdings would undoubtedly be far-reaching.

The Court has in reality not denied the initial definition of the word "commerce" nor has it denied the supremacy of federal control of commerce when business of national import has been involved. The Court has been cautious. It has been slow to define *what* business, or aspect thereof, has reached the *degree* of national character privileging an invocation of the federal supremacy. Degree of national character influences the Court's conception of what affects "movement."

The spirit of the Constitution is born of a dual conception of government—state and national. The Constitution itself is more deeply of dual nature—a law of words and a law of implication, the latter of which is entrusted to the wisdom of men. The judges have assumed the delicate task of weighing policies from administration to administration, seeking to solidify the implied law with care, to maintain the balance of dualism.

From the philosophy of dualism has developed the theory that interstate commerce itself might be divided into two fields: one in which national interests are paramount; the other in which state interests control.[29] The field in which national interest predominates is said to be beyond state interference, even in the silence of Congress. But the field in which state interest predominates is held open to state legislation until Congress enters the field justifiably. Whether or not Congress is justified in entering the state realm of interstate commerce is passed upon by the Court according to the criterion reiterated in the Wagner Act Steel case:

> The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself

[29] See Willoughby, *The Constitutional Law of the United States* (1929) Sec. 594. The cases are cited and the rule clearly announced in *Covington & Bridge Co.* v. *Kentucky*, 154 U.S. 204, 210-212 (1894).

establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.[30]

An incautious or too liberal interpretation of congressional claims upon the field of state interest might have obliterated the distinction between state and national government, or made serious encroachments upon state administration before federal machinery had been evolved or tested.[31]

The first assertion of federal power was made with respect to the field of transportation in *Gibbons* v. *Ogden*,[32] there being no doubt that regulation of traffic among the several states was the most emphatic need.[33] Thus first developed the ideology of *protection* to commerce. The protection of interstate commerce first became of importance with the rise of the railroads and the enactment of the Safety Appliance Act in 1893.[34] The congressional object was approved as "undoubtedly to safeguard interstate commerce, the life of passengers, and the life and limb of employees engaged therein."[35] This and subsequent acts based on the desire to protect the facilities of commerce were successful from the start. Not only was mechanical safety encouraged, but the Hours of Service Act of 1907[36] was also upheld to limit the working day and to provide relief periods for railway workmen. A danger to commerce from the inefficiency of tired

[30] 57 Sup. Ct. Rep. 621.

[31] The difficulties connected with the enforcement of the Eighteenth Amendment indicate the failure following upon inadequate federal organization.

[32] 9 Wheat. 1 (1824).

[33] That the problems of regulating "commerce with foreign nations and among the several states" were deemed to concern the removal of barriers obstructing the movement of goods across state lines is set forth by Hamilton and Madison, *The Federalist*, Nos. VII, IX, XLII; 3 Eliott, *op. cit.*, note 22, *supra*, 260.

[34] The constitutionality of the several measures involved was upheld by the Supreme Court in *St. Louis & R.* v. *Taylor*, 210 U.S. 281 (1908).

[35] *United States* v. *Atl. Coast Line R.*, 214 Fed. 498, 499 (1913).

[36] That the statute was not only constitutional but would exclude states from legislating in the premises was the holding in *Northern Pac. R.* v. *Washington*, 222 U.S. 370 (1912).

employees was deemed parallel to that of defective couplers. It is to be noted that this regulation was passed not to provide a happier life for employees but again to protect commerce from accidents that might result from human exhaustion.

The employers' liability statutes stepped into the realm of humanitarian motives but clung to the "protection" ideology for their approval.[37] Congress, following the example of the states which had enacted workmen's compensation laws,[38] wished to secure economic justice to railway men by eliminating certain defences available to the employers in negligence suits at common law. Only as relations of master and servant touch upon commerce are they subject to federal regulation.[39] Thus, the Court generously overlooked the well-known motivation, preferring to be led to a favorable decision by argument of government counsel that "if the conditions under which the agents or instrumentalities do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce. . . "[40]

The theory of protection to commerce was strained to the utmost in the interpretation of the Adamson law,[41] requiring

[37] The first Employers' Liability Act of 1906 failed because it applied to all employees of the railway whether or not they were connected directly with processes of interstate commerce. *Employers' Liability Cases*, 207 U.S. 463 (1908). The defect was cured by Congress and the result validated in the *Second Employers' Liability Cases*, 223 U.S. 1 (1912). Backshop employees were not deemed to be in interstate commerce under the second Liability Act. Now the *Virginian Ry.* case, note 2, *supra*, declares such backshop employees to be in interstate commerce for the purpose of collective bargaining. Thus a question is raised as to whether the application of the Liability statute will be similarly broadened.

[38] The state compensation laws tend to fix the sum recoverable by employees for certain injuries; the Employers' Liability statute does not limit the amount of recovery. See generally, Dodd, *Administration of Workmen's Compensation* (1936) 16 *et seq.*

[39] This view, prevalent in the early legislation, caused the failure of the Erdman Act, which made criminal the discharge of a railway employee for membership in a labor organization. *Adair* v. *United States*, 208 U.S. 161 (1908). The Erdman Act was replaced by the Newlands Act of 1913, eliminating objectionable sections of the first legislation. The *Virginian Ry.* case, note 2, *supra*, reverses the holding of the *Adair* case.

[40] *Second Employers' Liability Cases*, 223 U.S. 48 (1912).

[41] *Wilson* v. *New*, 243 U.S. 332 (1917).

payment of a ten-hour wage for an eight-hour working day. This legislation was necessary to avoid a railway strike, which if realized, would have impaired the effectiveness, at least temporarily, of the greatest servant of commerce—the railway.

The protection to commerce includes not only guarding its instrumentalities but removing obstructions from the path of those instrumentalities. These obstructions may be direct, physical barriers or barriers more subtly imposed upon the free flow of goods through the monopolistic organization of business. The situation in *Gibbons* v. *Ogden*[42] is typical of a direct obstruction which occurred through a state monopoly of commerce at which the federal power was authorized to strike. A citizen of the state of New York claimed the sole right to navigate the Hudson by reason of an exclusive license from that state. Yet the Court held that the connecting waterways of the United States were exclusively within the federal jurisdiction which, even in federal silence, permitted of no regulation by the states.

The desire to eliminate obstructions from commerce has supported not only penal laws designed to preserve and protect navigation,[43] but also the enactment of anti-trust laws and prohibitions against conspiracies of labor. Among the efforts to prevent trusts and monopolies in commerce was the Interstate Commerce Commission Act of 1887 and later amendments[44] directed against rebating and other specific undesirable practices. The Sherman Act of 1890, supplemented in 1914 by the Clayton and Trade Commission Acts,[45] has led to governmental supervision of combinations of capital. The relation to movement in commerce was somewhat strained, but some such sup-

[42] See note 32, *supra*.

[43] A similar authority exists in regard to obstructions on land, as evidenced by the Larceny Act of 1913, which makes criminal the breaking of seals of railway cars containing interstate or foreign shipments. However, Congress has relied for this protection upon the criminal laws of the states. See Cushman, note 16, *supra*, 304, 310.

[44] See Willoughby, *op. cit.*, note 29, *supra*, Sec. 492 *et seq.* for a development of federal control under the Act.

[45] *Id.*, c. xvi.

porting language was deemed necessary. The Sherman Act is based on *laissez-faire* economics—that values and fair price develop best through free competitive units. An attack upon monopoly through federal supervision was believed the best means of fostering free competition as a national policy, of preserving a free flow of commerce through prevention of economic paralysis of commerce by dominant capitalistic groups.

Although conceivably directed at capitalistic organizers solely, both the Interstate Commerce and Sherman Acts have been interpreted to include combinations of labor which were in restraint of trade.[46]

Within the narrow limits of the "flow of commerce" we may see an expansion of federal power to collateral subjects. Protection to commerce has supported federal specification of mechanical equipment, limitation of hours of labor, such social policy as the Employers Liability Act, and trade policies such as the Interstate Commerce and Sherman Acts. Instead of acknowledging freely that commerce did mean regulation of national business, whether primarily or not dependent upon movement, the Court has proceeded to justify national supervision of business on the pretense that Congress is acting with the chief motive of removing obstructions to interstate movement. It was said that the anti-trust laws freed movement of articles in commerce; and in the field of trade regulation generally the language, "burden on commerce," has been the source of judicial justification. Thus some local affairs may so impinge upon commerce that these must be an incidental subject of congressional regulation. The Court has upheld detailed

[46] A conspiracy to do acts prohibited by the Interstate Commerce Act was effected by a brotherhood of locomotive engineers who had induced the railroad for which they worked to join them in a boycott against another railroad refusing to meet the demands of its men on strike. *Toledo & R.* v. *Penn. Co.*, 54 Fed. 730 (1893).

In *Loewe* v. *Lawlor* (Danbury Hatters Case), 208 U.S. 274 (1908), laboring men instituting a secondary boycott were deemed such a combination in restraint of trade as was prohibited by the Sherman Act.

regulation not only of stockyards[47] but of grain exchanges[48] located in only a few cities but affecting business transactions throughout the entire country. A corner upon the exchange of cotton has been held to burden interstate commerce.[49] The Labor decisions likewise focus the interstate character of industry. While the Court has prevented government interference in local strikes when the only effect is indirectly to diminish or delay shipment,[50] it has sustained such interference in the Secondary Boycott Cases,[51] where prices and competitive conditions in various states would be affected and obviously where no state could control the situation.

The decisions under the Wagner Act warrant government interference to support collective bargaining because the unsatisfactory method of dealing with strikes has choked the flow of commerce or impeded the operations of concerns causing unfortunate economic results beyond state lines. That strict anology to the flow of commerce has been departed from is indicated by the statement of the Court that

> We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the 'stream of commerce" cases. Burdens and obstructions may be due to injurious actions springing from other sources.[52]

Thus in those industries whose national operations will be delayed by ineffectual dealings between employers and employees, an aspect of interstate commerce is recognized.

The *Guffey* and *Schechter* cases[53] are perhaps to be distin-

[47] *Stafford* v. *Wallace*, 258 U.S. 495 (1922); *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420 (1930).

[48] *Board of Trade* v. *Olsen*, 262 U.S. 1 (1923).

[49] *United States* v. *Patten*, 226 U.S. 525 (1913).

[50] *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1922); *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924); and *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103 (1933).

[51] *Loewe* v. *Lawlor*, 208 U.S. 274 (1908); *Paine Lumber Co.* v. *Neal*, 244 U.S. 459 (1917); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921); and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Ass'n.*, 274 U.S. 37 (1927).

[52] 57 Sup. Ct. Rep. 624.

[53] See notes 14 and 15, *supra*.

guished on both these grounds. If the current of commerce is a criterion, coal mining in Pennsylvania and wholesale disposition of chickens in New York may be characterized as outside this current since they exist at the beginning and end of commerce respectively and do not represent an intermediate or temporary point of abeyance. But even if we depart from the current of commerce doctrine to the newly announced criterion, still the *Guffey* and *Schechter* cases may be distinguished. The business organizations against which collective bargaining was enforced in the Wagner cases were not all strictly within the current of commerce. Yet the failure of these organizations to recognize collective bargaining would have caused economic fluctuations throughout the entire nation directly traceable to this failure. Thus, where the need for collective bargaining even in a local industry is felt beyond state lines, the right to regulate collective bargaining may be added to the federal domain over interstate commerce. The Codes attacked in the *Guffey* and *Schechter* cases were attempting to regulate details of working conditions—hours of labor and wages—and were not confined to the more general field of enforcement of collective bargaining.

Federal action in the Wagner cases does not prescribe local working conditions for an industry but authorizes collective bargaining, which in a sense can be characterized as more fundamental and intrinsically national. It may be possible to allow government regulation of collective bargaining alone without further interference in the state's inherent police-power sovereignty as to the details of labor. Working conditions may be most amenable to local adjustment. Residents of one state might prefer to develop certain details of working life in accordance with local need and advantage.[54] Bargaining power,

[54] So, too, the policy of Congress in the Social Security Act was to allow states freedom in choosing an unemployment insurance plan to meet local preference. For a discussion of the constitutionality of the various plans see Pike, *Unemployment Insurance and Workmen's Compensation*, 10 So. Cal. L. Rev. 253, 273 *et seq.* (1937).

however, is a force which the worker must possess. If employees of *large* business concerns strike for this right, an obstruction to commercial intercourse results of such national concern that the source from which it arose, the desire for collective bargaining, must be viewed as an aspect of interstate commerce.

The isolation of collective bargaining from industries heretofore considered local goes back to the dominance of state or federal rights in a particular field.[55] The state has yielded one aspect of business—collective bargaining—yet still trusts the wisdom of the Court in checking a hasty Congress from intruding too deeply. The power of the Court lies in pronouncing upon the individual instances which come before it. As Mr. Justice Hughes said in the steel case:

> The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power.[56]

Expansion of federal power has not been confined entirely to the concept of protection to the flow of commerce but has extended that protection to the public at large through certain controls upon that movement. Nowhere within the constitutional authorization is Congress empowered to legislate for the general welfare,[57] yet regulation of the public morals and health have been justified under the interstate commerce clause.

The famous *Lottery* case[58] is precedent for the contention that Congress may exclude from commerce articles which,

[55] A field in which national interest predominates or comes to dominate may be declared exclusively federal; fields in which state interests apparently prevail will be deemed subject to state regulation until Congress overcomes the presumption by stepping into the field.

[56] 57 Sup. Ct. Rep. 628.

[57] The words "general welfare" appear in Art. I, Sec. 8, Cl. 1 of the Constitution: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." "General welfare" has been deemed a limitation upon spending under the taxing clause rather than a substantive grant of power. The view of Hamilton, Madison, and Story are contained in Corwin, *Twilight of the Supreme Court* (1934), c. iv.

and attempts to protect the people from deception and fraud

[58] *Champion* v. *Ames*, 188 U.S. 321 (1903).

though not harmful directly to commerce itself, nevertheless may be excluded when their circulation tends to undermine the public welfare. The purpose of the Lottery Act was twofold: to protect the public and to enforce state prohibition of lotteries by making impossible the importation of tickets through commerce. This decision does not assert that Congress may prohibit any article entering upon commerce but only those which when delivered will harm the public.

The exclusion of unfit and misbranded foods,[59] diseased cattle,[60] obscene literature,[61] prize-fight films,[62] contraceptive articles and information,[63] enforce the principle announced in the *Lottery* case.

The Mann Act of 1910, which forbade the transportation of a woman across a state line for immoral purposes was likewise sustained.[64] The Motor Vehicle Theft Act was upheld[65] to prevent furtherance of crime by denying facilities of commerce to stolen cars. The recent kidnapping law[66] has expanded this theory considerably by setting up an irrebuttable presumption that a kidnapper who keeps his victim more than three days has been using the facilities of interstate commerce, and that in attempting to further his anti-social end through these means becomes subject to federal authority.

Reverting to the language of *Hoke* v. *United States*[67] in which the Mann Act was upheld, we find a rather sweeping estimate of Congress' power under the commerce clause.

[59] *Hipolite Egg Co.* v. *United States*, 220 U.S. 45 (1911).

[60] *Reid* v. *Colorado*, 187 U.S. 137 (1902).

[61] See Balter, *Some Observations Concerning the Federal Obscenity Statutes*, 8 So. Cal. L. Rev. 267 (1935).

[62] *Weber* v. *Freed*, 239 U.S. 325 (1915); *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291 (1923).

[63] *United States* v. *Popper*, 98 Fed. 423 (N.D. Cal. 1899).

[64] *Hoke* v. *United States*, 227 U.S. 308 (1913); *Caminetti* v. *United States*, 242 U.S. 470 (1917).

[65] *Brooks* v. *United States*, 267 U.S. 432 (1925).

[66] Sustained in *Gooch* v. *United States*, 297 U.S. 124 (1936). Cf. Cowan, *Ex parte Snatch*, 31 Ill. L. Rev. 734 (1937).

[67] See note 64, *supra*.

The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation "among the several states," that the power is complete in itself and that Congress as an incident to it, may adopt not only means necessary but convenient to its exercise and the means may have the quality of police regulations.[68]

This statement is sufficiently comprehensive to erase the objections raised in *Hammer* v. *Dagenhart*[69] had it been adhered to. The purpose of excluding from interstate commerce products of child labor was to discourage the exploitation of children in manufacturing. The deprivation of a market to these goods would suffocate the abuse by indirection. Yet the Court was unwilling to carry its scattered approvals of plenary powers to a field where the advisability of federal entrance was doubtful. Words of limitation were, therefore, used:

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.[70]

The Court was convinced that as to conditions of child labor, local interests prevailed incontrovertably over national.

Another method of attack upon this problem is suggested, however, by the policy of Congress to regulate movement in commerce in such a way as to aid the states in their local programs.[71] Certain reforms, originating in the states, may receive protection and emphasis through federal legislation, when the government itself would not be allowed to take the initiative on the subject. Programs of national as well as state desirability may be promoted in this way.

The states were early confronted with the delicate problem of how to enforce their local views and how at the same time to avoid burdening interstate commerce. The Court from the

[68] 227 U.S. 323 (1913).
[69] 247 U.S. 251 (1918).
[70] 247 U.S. 273-274 (1918).
[71] See generally Himbert & Stone, *Congressional Assistance to the States under the Commerce Power*, 9 Rocky Mt. L. Rev. 101 (1937).

beginning was sympathetic and in the *License Cases*[72] decided that a state could license or prohibit entirely sale in the original package of liquor brought in from other states or from abroad. But the success of the first legislation was overshadowed by two later holdings. The first, *Bowman* v. *Chicago & Northwestern Railway Co.*,[73] invalidated an Ohio statute which sought to penalize railroads delivering liquor with knowledge that the consignees were not authorized to sell. The second, *Leisy* v. *Hardin*[74] overruled the *License* cases and denied the state the privilege of regulating transactions in the original package. Both these decisions were based on the holding that the subject regulated was not available to the states when Congress in fact had not released the field to them.

Steps were next taken by Congress to release the field with the Wilson Act,[75] unsuccessful because of an unfortunate judicial interpretation,[76] and further cooperation with the states was effected by the Webb-Kenyon Act, which was successfully maintained in the case of *Clark Distilling Co.* v. *Western Maryland Railway Co.*[77] Liquor was deemed to be in a class with lottery tickets, an article whose movement in commerce would promote immorality. Instead of prohibiting the transportation of all liquor, the act made unlawful only shipments to those states barring it locally. The Reed "Bone Dry" Amendment extended the prohibition to instances where a state had barred

[72] 5 How. 504 (1847). That goods brought in from foreign countries do not become subject to the jurisdiction of the individual states was decided two years previously in *Brown* v. *Maryland*, 12 Wheat. 419 (1827).

[73] 125 U.S. 465 (1888).

[74] 135 U.S. 100 (1890).

[75] The Act provided that "intoxicating liquors . . . . transported into any State or Territory or remaining therein . . . . shall upon arrival . . . . be subject to the operation . . . . of the law of such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Act of Aug. 8, 1890, 26 Stat. at L. 313, sustained in *In Re Rahrer*, 140 U.S. 545 (1891).

[76] In *Rhodes* v. *Iowa*, 170 U.S. 412 (1898), arrival was interpreted to mean delivery to a consignee and not arrival of shipment at a state line. This construction made enforcement of the law difficult and ineffective.

[77] 242 U.S. 311 (1917).

the sale of liquor, despite the fact that home consumption of liquor might at the same time be legal.[78] Congress has further sought to cooperate with the states in the preservation of game and has refused lawbreakers access to facilities of interstate commerce in disposing of their goods.[79]

The theory of cooperation with state legislation has been advanced as the next ground upon which to rest child-labor legislation. That such an attempt would be successful is suggested by the analogous situation in respect to prison-made goods. The Hawes-Cooper Act, construed in *Whitfield* v. *Ohio*,[80] required that all goods be labelled as to the prison and state of their manufacture and that upon arrival in any state they become subject to its laws. An extension of the doctrine is embraced in the Ashurst-Sumners Act, which prohibits shipment of prison-made goods to states banning their sale. The law was approved in the recent case of *Kentucky Whip & Collar Co.* v. *Illinois Central Railway Co.*[81] The effect of these two acts is to confine competition in prison-made goods to those states allowing them a market and only upon such terms as are sanctioned by the state in order that competitive conditions be somewhat equalized, or a market removed altogether. If Congress should enact similar protection to states prohibiting or regulating child labor, the evil would be restricted at least to the states which by the absence of legislation have indicated their willingness to tolerate it.

A survey of federal expansion upon the judicial lines announced and developed will indicate a trend somewhat as follows: Congress, as we have seen, has acquired a general police power and social control through legislation affecting transportation and its human agencies. This police-power influence has

[78] This amendment to the Postoffice Appropriation Act of 1917 carried federal cooperation to the extent of encroachment upon internal state regulation. See *United States* v. *Hill*, 248 U.S. 420 (1919), and Cushman, note 16, *supra*, 409.

[79] *Rupert* v. *United States*, 181 Fed. 87 (C.C.A. 8th, 1910).

[80] 297 U.S. 431 (1936).

[81] 57 Sup. Ct. Rep. 277 (1937).

been extended to the general public by refusal to allow commerce to consummate transactions harmful to the public. An arbitrary manipulation of commerce to promote the general welfare apparently has been barred by the doctrine of *Hammer* v. *Dagenhart.*[82] This decision prevented Congress from making shipments in commerce dependent upon compliance with certain standards of production prior to shipment. Yet policies of states which are favored by Congress may be nurtured through regulations of commerce, thus indirectly promoting a national policy. The most recent and most important aspects of interstate commerce concern the regulation of business.

As has been pointed out, the word "commerce" may well have meant not only movement but all transactions of business extending from one state to another. There is evidence that such was the meaning of the word and that the intent of the Fathers was for the government to regulate trade when the states could not effectively control such trade, or the aspects thereof, because of their national import. Nevertheless, the early and continued emphasis upon transportation led to an interpretation that commerce meant essentially movement. Although the field was thus narrowed, national need demanded increased power, and the application of the commerce clause has been gradually expanded. "Movement" language is still resorted to in the Wagner Act cases, but a practical appraisal indicates a broader view as to the factual conditions which "affect" or "obstruct" the "movement" of commerce. That the national aspects of a business and yet not its entire organization may be subjected to federal regulation seems a likely interpretation of the recent trend of decision. Thus is reserved to the states the control of aspects of business more suitably regulated locally.

Studies in constitutional law through any rationale presented must recognize the responsibility with which the justices are entrusted and realize that seeming incongruities in logic may often be wisdom in policy. Had business early been de-

[82] See note 63, *supra.*

clared national in character, it is conceivable that the government would have been lacking in the experience, resources, and administrative technique necessary to cope with problems so gigantic. The caution with which "commerce" has been expanded through judicial sanction of what constitutes business on a national scale, whether aided by the presence of movement or not, is not to be discredited as ignorance by facetious writers but rather would be more profitably understood in the Court's desire to maintain the balance between federal and state power which underlies the Constitution as the foundation of our present system of government.